Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PRECIOUS BANKOLE,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: August 18, 2005

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QUESTIONS PRESENTED

I. Whether, in connection with her petition for a writ of habeas corpus, seeking protection under the Convention Against Torture, the United States Court of Appeals for the Second Circuit committed reversible error in concluding that Petitioner-Appellant, Precious Bankole, failed to meet her burden of proving more likely than not that she would be imprisoned and tortured under Nigerian law for a drug-related offense if she were returned to her home country of Nigeria.

II. Whether the United States Court of Appeals for the Second Circuit committed reversible error by concluding that Petitioner-Appellant is not eligible for family hardship relief under the interpretation of Immigration and Nationality Act, § 212(h), 8 U.S.C., § 1182(h), set forth in *Beharry v. Reno*, 183 F.Supp.2d 584 (S.D.N.Y. 2002), and whether the Supreme Court of the United States should allow Petitioner-Appellant relief for humanitarian reasons by extending the holding of *Beharry, supra*, to those who have committed aggravated felonies even where said offenses constituted aggravated felonies at the time they were committed.

PARTIES TO THE PROCEEDING

Pursuant to Rules of the Supreme Court of the United States Rule 14.1(b), all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case.

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CITATIONS OF THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit which is the subject of the instant Petition for Writ of Certiorari is reported at 126 Fed.Appx. 503, 2005 WL 670611. *See Bankole v. Immigration and Naturalization Service*, 126 Fed.Appx. 503, 2005 WL 670611 (2nd Cir. 2005). (A. 1a.)

In addition, the opinion of the United States District Court for the District of Connecticut which was the subject of Petitioner-Appellant's appeal to the United States Court of Appeals for the Second Circuit in *Bankole v. Immigration and Naturalization Service*, 126 Fed.Appx. 503, 2005 WL 670611 (2nd Cir. 2005), is reported at 306 F.Supp.2d 185. *See Bankhole v. Immigration and Naturalization Service*, 306 F.Supp.2d 185 (2003). (A. 11a.)[1]

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[1] The reference to Petitioner-Appellant's surname as "Bankhole" in *Bankhole v. Immigration and Naturalization Service*, 306 F.Supp.2d 185 (2003), constitutes scrivener's error. *See Bankole v. Immigration and Naturalization Service*, 67 Fed.Appx. 49, 2003 WL 21309217 (2nd Cir. 2003)(in which the United States Court of Appeals for the Second Circuit issued its initial Summary Order vacating the original judgment of the United States District Court for the District of Connecticut and remanding this case to the United States District Court for the District of Connecticut for further proceedings).

BASIS FOR JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit sought to be reviewed in Petitioner-Appellant's instant Petition for Writ of Certiorari was entered by the United States Court of Appeals for the Second Circuit on March 23, 2005. (*See* A. 1a: Summary Order of the United States Court of Appeals for the Second Circuit, dated 3/23/05).

The Supreme Court of the United States has jurisdiction in this matter pursuant to 28 U.S.C. § 1254(1).

TREATIES, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Pursuant to Rules of the Supreme Court of the United States Rule 14.1(f), the treaties, statutes and regulations involved in this case consist of the following:

I. *Treaties*

Convention Against Torture,
1465 U.N.T.S. 85, G.A. Res. 39/46,
39th Sess., U.N. GAOR Supp. No.51, at 197,
U.N. Doc. A/39/51 (1984) (A. 23a)

International Covenant on Civil and
Political Rights,
S. Treaty Doc. 95-2 (1978),
999 U.N.T.S. 171

The Convention of Rights of the Child,
U.N. Doc. A/44/736 (1989), reprinted in
28 I.L.M. 1457 (1989)

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 1, U.N. Doc. A/810 (1948)

II. *Statutes*

8 U.S.C. § 1101(a)(43) (A. 23a)

INA § 212(h), 8 U.S.C. § 1182(h) (A. 27a)

18 U.S.C. § 1503 (A. 28a)

18 U.S.C. § 1623 (A. 29a)

18 U.S.C. § 1956 (A. 31a)

III. *Regulations*

8 C.F.R. § 208.16(c) (A. 41a)

STATEMENT OF THE CASE

I. *Introduction*

This case is a habeas immigration appeal by Petitioner-Appellant, Precious Bankole (hereinafter, Appellant), who is trying to avoid removal to Nigeria, where she fears that she would be subjected to life-threatening prison conditions and be unable to care for her American-born son, who has Down's Syndrome.

Appellant is a lawful permanent resident alien who was convicted in the United States in 1997 on

federal charges of conspiracy to engage in money laundering, perjury and obstruction of justice.[2]

Appellant's criminal conviction led to Respondent-Appellee, Immigration and Naturalization Service (hereinafter, Appellee) seeking and obtaining a final order of removal to return Appellant to her native country of Nigeria.

Following re-entry against her of a final order of removal, Appellant filed a petition for writ of habeas corpus in the United States District Court for the District of Connecticut.

The district court subsequently denied relief on multiple grounds, including that Appellant was not eligible as an aggravated felon for a grant of discretionary relief from removal.

Appellant subsequently appealed to the United States Court of Appeals for the Second Circuit.

In a decision dated June 5, 2003, the United States Court of Appeals for the Second Circuit vacated the district court's judgment and remanded this matter to the district court.

On remand, the district court again denied relief in a decision dated December 5, 2003, and Appellant subsequently appealed to the United States Court of Appeals for the Second Circuit.

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[2] The Indictment charging Appellant with said offenses also contains numerous references, in the Count charging Appellant with conspiracy to commit money laundering, to violations of controlled substance laws, which Appellant contended before the United States District Court for the District of Connecticut and before the United States Court of Appeals for the Second Circuit, is a relevant indicator of the likelihood that Appellant would be imprisoned and subjected to abuse if she were forced to return to her native country of Nigeria.

In a decision dated March 23, 2005, the United States Court of Appeals affirmed the district court's December 5, 2003 decision.

Appellant subsequently filed the instant Petition for Writ of Certiorari with the Supreme Court of the United States, before whom this case is currently pending.

II. *Overview of the Proceedings Below*

Appellant initially filed a pro se petition for writ of habeas corpus in the United States District Court for the District of Connecticut, seeking relief from a final order of removal from the United States.

On August 8, 2002, the district court subsequently denied Appellant's petition by written ruling, and judgment entered on August 12, 2002.[3]

On September 6, 2002, Appellant filed a timely notice of appeal, and on October 7, 2002, Appellant filed a motion for appointment of counsel and for stay of removal, both of which motions were subsequently denied by the United States Court of Appeals for the Second Circuit on December 6, 2002.

In connection with said appeal, Appellant contended 1. that the Immigration Judge and the Board of Immigration Appeals committed reversible error by denying Appellant relief under the Convention Against Torture, and 2. that the district court committed reversible error by determining that Appellant was not eligible for family hardship relief

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[3] In its August 8, 2002 decision, the district court concluded, inter alia, that Appellant was not eligible as an aggravated felon for a grant of discretionary relief from removal.

under INA, § 212(h), 8 U.S.C. § 1182(h), and *Beharry v. Reno*, 183 F.Supp. 584 (E.D.N.Y. 2002).[4]

In a decision dated June 5, 2003, the United States Court of Appeals for the Second Circuit vacated the district court's judgment and remanded this matter to the district court, on the basis of intervening case law.

A. *Convention Against Torture*

In its June 5, 2003 decision, the Court of Appeals indicated that "not long after the district court's entry of judgment in this case, we decided *Wang v. Ashcroft*, 320 F.3d 130 (2nd Cir. 2003), in which we held that the Foreign Affairs Reform and Restructuring Act of 1988, which implements the relevant article of the Convention Against Torture, does not deprive the federal courts of habeas jurisdiction to review the [Board of Immigration Appeals'] denial of claims for withholding of removal pursuant to the [Convention Against Torture]." (*See Bankole v. Immigration and Naturalization Service*, 67 Fed.Appx. 49,51 (2nd Cir. 2003)). (A. 8a).

In its June 5, 2003 decision, the Court of Appeals further indicated that "the government concedes that, in light of *Wang*, *supra*, the district court erred in not passing on [Appellant's] [Convention Against Torture] claim," and that "the government [,][however][,] [asserts that the Immigration Judge's] decision [should be] affirm[ed] 'on the merits' rather than [being] remand[ed] to the district court." (*See Id.*, at 51). (A. 8a).

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[4] *See Beharry v. Reno*, 183 F.Supp. 584 (E.D.N.Y. 2002), *reversed on grounds not relevant here*, 329 F.3d 51 (2nd Cir. 2003).

In its June 5, 2003 decision, the Court of Appeals refused to affirm the district court's decision on the merits, and remanded this case to the district court "to consider the [Convention Against Torture] arguments." (*See Id.*, at 51). (A. 8a).

B. *Beharry*

In addition, in its June 5, 2003 decision, the Court of Appeals concluded that "as for the possible *Beharry* application, this too is best considered in the first instance by the district court on remand." (*See Id.*, at 52). (A. 9a).

In its June 5, 2003 decision, the Court of Appeals also dismissed Appellee's argument that the court "find a 'waiver' of the *Beharry* argument [for the purported reason that said argument] was not made to the court below." (*See Id.*, at 52 (A. 9a) ("The government asks us...to find a 'waiver' of the *Beharry* argument, as it was not made to the court below. We think this is inappropriate, as the petitioner was pro se and as such cannot be fairly expected to have had a nimble familiarity with the most recent, relevant case law.")(emphasis added)).

In its June 5, 2003 decision, the Court of Appeals also indicated that "on remand, the district court may wish to consider (1) whether [Appellant's] failure to make a *Beharry*-type argument during the administrative proceedings (when she was counseled) amounts to a waiver; (2) whether, assuming[,] *arguendo*[,] that *Beharry* was rightly decided, Appellant was entitled to a sec. 212(h) hearing; (3) whether *Beharry*'s 'international law' gloss on sec. 212(h) is correct; and/or (4) any other arguments that the court deems relevant to [Appellant's] request for a

sec. 212(h) hearing." (*See Id.*, at 52 (A. 9a) (emphasis added)).

C. *Convention Against Torture Issue on Remand*

In its decision on remand, dated December 5, 2003, the district court subsequently noted that "[Appellant] has stated that, if she is returned to Nigeria, she will be tortured and imprisoned, pursuant to the 1990 Decree No. 33 of the Nigerian Drug Enforcement Agency...[which] provides that a Nigerian citizen who is convicted of a narcotic drug offense in a foreign country...'shall be liable to imprisonment for a term of five years without an option of fine and [her] assets and properties shall be liable to forfeiture as provided by this Decree.'" (*See Bankchole v. Immigration and Naturalization Service*, 306 F.Supp.2d 185,187 (2003), *citing McDaniel v. United States INS*, 142 F.Supp.2d 219 (D.Conn. 2001)). (A. 15a).

In her December 5, 2003 decision, Senior District Court Judge Ellen Bree Burns also specifically concluded that "this Court must respectfully disagree with the finding of the [Immigration Judge] that '[t]here is no evidence that, while conditions in the Nigerian prison system are very poor for anyone who is detained in that system, there would be intentional infliction of harm by authorities.'" (*See Id.*, at 187 (A. 16a), *quoting* Oral Decision of Immigration Judge, dated November 28, 2001, at 11-12); (*See, also, Id.*, at 187-188 (A. 16a), *citing* The Nigerian Report on Human Rights Practices, issued by the U.S. Department of State on February 23, 2001 (indicating performance of torture in Nigerian prison system and that "at least one inmate died per day [in one particular Nigerian prison].")(emphasis original)); (*See, also, Id.*, at 188 (A. 16a) ("When [as in Nigeria] at least

one inmate dies per day in a prison, in part due to the withholding of proper medical treatment, it must be inferred that an extreme form of cruel and unusual and inhumane treatment is occurring therein. This Court does not accept the rationale [of the Immigration Judge in the instant case] that simply because 'Nigeria is a very poor country...it may not have the resources to maintain an adequate prison system.' (citation omitted). 'Adequate' is the complete antithesis of the extreme form of cruel, unusual or inhumane treatment described [in The Nigerian Report on Human Rights Practices, *supra*]."]).

However, in her December 5, 2003 decision, Judge Burns concluded that "the difficulty with [Appellant's] claim that she would be subjected to this type of horrific treatment is that she was not convicted of a drug offense within the meaning of [Nigerian Drug Enforcement Agency] Decree No. 33," for the purported reason that Appellant was instead "convicted of conspiracy to commit money laundering...; perjury...; and obstruction of justice," and that "although various paragraphs in the Indictment refer to [Appellant's] son's trafficking in crack cocaine, he was not indicted on any drug-related offense and [Appellant] [likewise] was not [indicted on any drug-related offense]." (*See Id.*, at 188 (A. 17a) (emphasis added)); (*See, also, Id.*, at 188 (A. 17a), *citing* 1990 Decree No. 33 of the Nigerian Drug Enforcement Agency, *supra* ("[Appellant's] claim under [the Convention Against Torture]...must fail [for the purported reason that Appellant] is not a 'Nigerian citizen who [has been] convicted of a narcotic drug offense in a foreign country,'[and for the further purported reason that] it is [therefore] unreasonable to believe that [Appellant] will be imprisoned upon her return to Nigeria, let alone tortured therein")(emphasis added)).

D. *Beharry Issue on Remand*

In her December 5, 2003 decision, Judge Burns further concluded that Appellant did not waive her right to make a *Beharry*-type international law claim by failing to raise the issue before the administrative agency when she was counseled. (*See Id.*, at 189 (A. 18a)); (*See, also, Id.*, at 189 (A. 19a), *citing* Oral Decision of Immigration Judge, dated 11/28/01, p.2, *Elliot Coal Min. Co., Inc. v. Director, Office of Workers' Compensation Programs*, 17 F.3d 616 (3rd Cir. 1994)("This Court now holds that [Appellant] did not waive her *Beharry*-type argument before the INS [when she was represented by counsel], as the initial removal proceedings, at which the [Immigration Judge] found [Appellant] deportable, were held on November 28, 2001, and *Beharry* was not decided until January 22, 2002. It would be unjust to hold [Appellant's] counsel, who appeared on her behalf before the [Immigration Judge], accountable for failing to make the extraordinary arguments as to complex international law upon which *Beharry* was decided three months later. Further, [Appellant] did make a claim pursuant to the identical section of the INA presently under consideration, [INA, § 212(h), 8 U.S.C. § 1182(h)]...[:] The Court agrees with [Appellant] that she need not have made the exact same type of argument before the administrative agency as she is presently making before this Court.")).

However, Judge Burns further concluded that *Beharry, supra*, is inapplicable to the instant case for the purported reason that Appellant was convicted of an aggravated felony that was defined as an aggravated felony at the time of its commission. (*See Id.*, at 189-190 (A. 19a-20a)); (*See, also, Id.*, at 189-190, *citing Beharry, supra*, 183 F.Supp.2d at 585-587, 603-605, 8 U.S.C. § 1101(43) (1988 Ed., Supp. II) ("In Beharry, the court looked to the International

Covenant on Civil and Political Rights[,][S. Treaty Doc. 95-2 (1978), 999 U.N.T.S. 171], the Convention of Rights of the Child[,][U.N. Doc. A/44/736 (1989), reprinted in 28 I.L.M. 1457 (1989)], and the Universal Declaration of Human Rights[,][G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 1, U.N. Doc. A/810 (1948)][,] to hold that customary international law requires the INS to hold 'compassionate' hearings prior to deporting certain lawful permanent residents who have resided in the United States for seven years and where removal would cause extreme hardship to family members - - namely, those aliens who have been convicted of an 'aggravated felony' as defined after they committed their crime, but which was not so characterized when they committed the crime. In the present case, [Appellant] was convicted on June 6, 1997, for, inter [alia], conspiracy to commit money laundering in violation of [18 U.S.C. § 1956(h)]...However, as early as January 3, 1989, [8 U.S.C. § 1101(a)(43)] included, as an aggravated felony, 'any offense described in [18 U.S.C. § 1956](relating to the laundering of monetary instruments.'...[Appellant] [therefore purportedly] was convicted in 1997 of a crime denominated as an 'aggravated felony' in excess of eight years prior to her conviction[:] [Appellant] [therefore purportedly] fails to bring herself within the ambit of *Beharry*.")).

After concluding that Appellant "fails to bring herself within the ambit of *Beharry*," Judge Burns further concluded that since Appellant fails to bring herself within the ambit of *Beharry*, "it is unnecessary for this Court to explore the many esoteric issues of international law raised in [*Beharry*, *supra*] and opine whether Judge Weinstein was right or wrong." (*See Id.*, at 190) (A. 20a).[5]

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[5] As stated above, in its June 5, 2003 decision remanding this matter to the district court, the United States Court of Appeals for the Second Circuit specifically suggested that on

E. *The Court of Appeals March 23, 2005 Decision*

As stated above, in a decision dated March 23, 2005, the United States Court of Appeals for the Second Circuit affirmed the district court's December 5, 2003 decision.

In its March 23, 2005 decision, the Court of Appeals concluded that "as to [Appellant's] potential imprisonment in Nigeria, we agree with the District Court that [Appellant] has not meet her burden [of] proving 'more likely than not' that she will be imprisoned and tortured under Nigerian Decree 33 for a drug offense [if she were returned to Nigeria]." (*See* A. 3a: Summary Order of United States Court of Appeals for the Second Circuit, dated 3/23/05).

In its March 23, 2005 decision, the Court of Appeals further concluded "we also agree with the District Court's holding [that] [Appellant] is not entitled to a[n] [INA,] sec. 212(h) hearing," for the purported reason that "[Appellant's] crime of money laundering was an aggravated felony...at the time her offense was committed." (A. 3a-4a).

As further stated above, Appellant subsequently filed the instant Petition for Writ of Certiorari with the Supreme Court of the United States, before whom this case is currently pending.

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remand the district court consider, inter alia, "whether Beharry's 'international law' gloss on [INA, sec. 212(h)] is correct." (*See* A. 14a).

III. *Factual Background*

Appellant's Entry into the United States and her Conviction

As stated above, Appellant is a native and citizen of Nigeria.

Appellant was admitted to the United States in 1972 as a spouse of a non-immigrant student, and her status was adjusted to that of a lawful permanent resident in 1984.

On June 6, 1997, Appellant was convicted after a jury trial in the United States District Court for the Eastern District of Virginia of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); perjury, in violation of 18 U.S.C. § 1623; and obstruction of justice, in violation of 18 U.S.C. § 1503.

Appellant was sentenced to a total effective sentence of 63 months imprisonment, and said conviction and sentence was affirmed by the Fourth Circuit.

INS Removal Proceedings

The INS instituted removal proceedings as a result of the above-mentioned convictions.

In hearings before the Immigration Judge, Appellant conceded her removability but sought various forms of relief from removal, including, inter alia, withholding of removal under the Convention Against Torture, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No.51, at 197, U.N. Doc. A/39/51 (1984), and family hardship relief under INA, § 212(h), 8 U.S.C. § 1182(h).

The Immigration Judge found Appellant ineligible for withholding of removal under the Convention Against Torture, for the purported reason that Appellant failed to meet the definition of torture under applicable regulations.

The Immigration Judge also specifically concluded that Appellant was ineligible for a family hardship waiver, for the purported reason that Appellant had been convicted of an aggravated felony.

Appellant subsequently filed an appeal with the Board of Immigration Appeals, subsequent to which the Board of Immigration Appeals, on April 30, 2002, affirmed without opinion the decision of the Immigration Judge.

District Court Proceedings

Appellant proceeded pro se in the United States District Court for the District of Connecticut, at which time the district court addressed the issues that had been raised by Appellant before the Immigration Judge, including, inter alia, Appellant's claim that she qualified for withholding of removal under the Convention Against Torture, and that Appellant should receive a family hardship waiver.

With regard to the Convention Against Torture claim, the district court initially refused to consider said claim, concluding that a federal court has no general federal jurisdiction to entertain such a claim for the purported reason that the Convention Against Torture is not a self executing treaty.

With regard to Appellant's claim that she should receive a family hardship waiver pursuant to INA, § 212(h), the district court held that Appellant

was ineligible for consideration for such a family hardship waiver, for the purported reason that Appellant was a lawful permanent resident convicted of an aggravated felony.

D. *First Appeal to Court of Appeals*

As stated above, Appellant subsequently filed an appeal to the United States Court of Appeals for the Second Circuit, claiming that the district court committed reversible error, in that 1. Appellant was entitled to relief under the Convention of Torture due to the treatment that she would receive if she returned to Nigeria, and in that 2. Appellant was entitled to a family hardship hearing pursuant to INA, § 212(h).

As further stated above, in a decision dated June 5, 2003, the United States Court of Appeals for the Second Circuit vacated the district court's judgment and remanded this matter to the district court, on the basis of intervening case law.

E. *District Court Proceedings on Remand*

As stated above, in its decision on remand, dated December 5, 2003, the district court concluded that Appellant is not entitled to relief under the Convention Against Torture, for the purported reason that Appellant was not convicted of a drug-related crime within the meaning of the 1990 Decree No. 33 of the Nigerian Drug Enforcement Agency.

As further stated above, the district court also concluded that Appellant is not entitled to relief under *Beharry, supra*, for the purported reason that Appellant was convicted of an aggravated felony that

was defined as an aggravated felony at the time of its commission.

F. *Second Appeal to Court of Appeals*

As stated above, Appellant subsequently appealed the district court's December 5, 2003 decision to the United States Court of Appeals for the Second Circuit.

As further stated above, the Court of Appeals affirmed the district court's December 5, 2003 decision and Appellant subsequently filed the instant Petition for Writ of Certiorari with the Supreme Court of the United States, before whom this case is currently pending.

ARGUMENT

I. The United States Court of Appeals for the Second Circuit committed reversible error in concluding that Appellant failed to meet her burden of proving more likely than not that she would be imprisoned and tortured under Nigerian law for a drug-related offense if she were returned to her home country of Nigeria.

As stated above, in its decision on remand, dated December 5, 2003, the district court concluded that "[Appellant's] claim under [the Convention Against Torture]...must fail [for the purported reason that Appellant] is not a 'Nigerian citizen who [has been] convicted of a narcotic drug offense in a foreign country,'[and for the further purported reason that] it is [therefore] unreasonable to believe that [Appellant] will be imprisoned upon her return to Nigeria." (*See*

306 F.Supp.2d at 188 (A. 18a), *citing* 1990 Decree No. 33 of the Nigerian Drug Enforcement Agency, *supra*).

However, as further stated above, the count of the Indictment charging Appellant with federal charges of conspiracy to engage in money laundering (of which Appellant was convicted) contains a litany of specific allegations that the money laundering in question was drug-related.[6]

Thus, Appellant's conviction of said money laundering charges is the functional equivalent of a "conviction of a narcotic drug offense in a foreign country" within the meaning of Decree No. 33 of the Nigerian Drug Enforcement Agency. *See People v. Thompson*, 328 Ill.App.3d 360, 765 N.E.2d 1209 (2002)(provisions of driving under influence (DUI) statute that made third or subsequent commission of DUI an aggravated DUI carrying felony classification provided enhanced penalty based on commission of prior crimes; both of defendant's prior commissions of DUI were the functional equivalent of "convictions" and were not elements of crime of aggravated DUI that needed to be proved to trier of fact beyond reasonable doubt, but rather they were factors in aggravation that had to be proved at sentencing)(emphasis added); *See, also, Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994)(proceeding instituted by state of Montana to collect tax on possession of drugs following taxpayers' conviction in Montana on drug offenses was functional equivalent of successive criminal prosecution that placed taxpayers in jeopardy a second time for same offense)(emphasis added).

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[6] As set forth above in footnote 2, *infra*, said count of said Indictment contains a voluminous list of references linking the money laundering activities of Appellant to a drug-related conspiracy involving Appellant, mentioning illicit drugs more than 10 (ten) times, in a voluminous, detailed, 10 (ten) page recitation.

Thus, contrary to the conclusion of the district court on remand, and the subsequent conclusion of the Court of Appeals, Appellant likely would be imprisoned upon her return to Nigeria, and tortured therein[7], since, for all practical purposes, it is more likely than not that Appellant's conviction of conspiracy to commit money laundering would be construed by Nigerian officials as a "drug-related" conviction, by virtue of the plethora of references to illicit drugs contained in the very Indictment that led to Appellant's conviction. *See Amanfi v. Ashcroft*, 2003 WL 21122420 (3rd Cir. 2003), *citing* 8 C.F.R. § 208.16(c) (Convention Against Torture, as implemented by INS regulations, prohibits removal of alien to a country when alien sustains his burden of proving that it is more likely than not that he will be subject to torture, at instigation of, or with acquiescence of public official); *See, also, Bellout v. Ashcroft*, 363 F.3d 975 (9th Cir. 2004)(Article 3 of the United Nations Convention Against Torture or Punishment prohibits removal to a state where there are substantial grounds to believe the alien would be tortured); *See, also, Mulanga v. Ashcroft*, 2003 WL 22683042 (3rd Cir. 2003)(once an applicant establishes a claim for relief under the Convention Against Torture, he or she may not be removed to the

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[7] The conditions of torture faced by prisoners in Nigerian prisons are well-documented in the district court judge's December 5, 2003 decision on remand, as set forth above. (*See* 306 F.Supp.2d at 188 (A. 17a) ("When [as in Nigeria] at least one inmate dies per day in a prison, in part due to the withholding of proper medical treatment, it must be inferred that an extreme form of cruel and unusual and inhumane treatment is occurring therein. This Court does not accept the rationale [of the Immigration Judge in the instant case] that simply because 'Nigeria is a very poor country...it may not have the resources to maintain an adequate prison system.' (citation omitted). 'Adequate' is the complete antithesis of the extreme form of cruel, unusual or inhumane treatment described [in The Nigerian Report on Human Rights Practices, *supra*].")).

country where the torture occurred); *See, also, Khup v. Ashcroft*, 2004 WL 1588112 (9th Cir. 2004)(alien faced at least a 51 percent chance of being tortured should he be removed to his native country, supporting relief under Convention Against Torture).

Thus, for all of the foregoing reasons, the district court committed reversible error on remand by denying Petitioner-Appellant relief under the Convention Against Torture, and the United States Court of Appeals for the Second Circuit likewise committed reversible error by subsequently affirming said decision in its March 23, 2005 decision.

II. The United States Court of Appeals for the Second Circuit committed reversible error by concluding that Appellant is not eligible for family hardship relief under the interpretation of Immigration and Nationality Act § 212(h), 8 U.S.C. § 1182(h), set forth in *Beharry v. Reno*, 183 F.Supp.2d 584 (S.D.N.Y. 2002), and the Supreme Court of the United States should allow Appellant relief for humanitarian reasons by extending the holding of *Beharry, supra*, to those who have committed aggravated felonies even where said offenses constituted aggravated felonies at the time they were committed.

As stated above, in its decision on remand, dated December 5, 2003, the district court concluded that *Beharry, supra*, is inapplicable to the instant case for the purported reason that Appellant was convicted of an aggravated felony that was defined as an aggravated felony at the time of its commission. (*See* 306 F.Supp.2d at 189-190 (A. 13a), *citing Beharry, supra*).

As further stated above, in its decision dated March 23, 2005, the United States Court of Appeals for the Second Circuit subsequently affirmed the district court's December 5, 2003 decision.

However, Appellant contends that in light of the special circumstances of Appellant having an American-born son with Down's Syndrome, the Supreme Court of the United States should reverse the district court's decision for humanitarian reasons, by extending the holding of *Beharry, supra*, to those who have committed aggravated felonies even where said offenses constituted aggravated felonies at the time they were committed. *See Belayneh v. INS*, 213 F.3d 488 (9th Cir. 2000)(the Board of Immigration Appeals may grant asylum for humanitarian reasons where an applicant or his or her family has suffered under atrocious forms of persecution, even where there is little likelihood of future persecution); *See, also, People v. Superior Court (Perez)*, 89 Cal.Rptr.2d 326 (Cal.App.2.Dist. 1999)(Attorney General has nonreviewable discretion to defer any action on any deportation proceeding for humanitarian reasons or for his or her own convenience); *See, also, Haddam v. Reno*, 54 F.Supp.2d 602 (E.D.Va. 1999)(Attorney General has the discretionary authority to parole an alien into the United States temporarily only on a case-by-case basis for urgent humanitarian reasons or significant public benefit); *See, also, State v. Bell*, 358 N.E.2d 556 (Ohio 1976)(punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime).

Thus, for the foregoing reasons, Appellant respectfully requests that this honorable court make a good faith extension of existing law, by extending the holding of *Beharry, supra*, as requested above, in order to afford Appellant and those similarly situated

with the opportunity for a compassionate hearing for family hardship relief under INA, § 212(h), 8 U.S.C. § 1182(h). *See United States v. Folding Carton Administration Committee*, 1988 WL 74829, at 7, 1988-2 Trade Cases P 68,176 (N.D.Ill. 1988)("[T]his action indicates a creative approach to making remedies fit perceived wrongs...[;] The essence of good advocacy is creative thinking. The stretching of statutory provisions to remedy perceived wrongs should not be stifled merely because the law has not been utilized in the same manner in the past. The history of law is replete with examples of formerly unknown, unusual, and/or unpopular views becoming the acceptable norm. The purpose behind the 'good faith extension of existing law' exception contained in [Fed. Rules Civ. Pro. Rule 11]...is the prevention of a chilling effect on such creative lawyering.").

CONCLUSION

Based upon all of the foregoing reasons, Appellant contends that in its March 23, 2005 decision, the United States Court of Appeals for the Second Circuit has decided an important question of federal law that has not been, but should be settled by the Supreme Court of the United States.

Appellant further contends that the March 23, 2005 decision of the Court of Appeals should be reversed, and that this honorable court should allow Appellant relief under the Convention Against Torture.

In the alternative, Appellant respectfully requests that this honorable court reverse the March 23, 2005 decision of the Court of Appeals, and extend the holding of *Beharry, supra*, as requested above, in order to afford Appellant and those similarly situated

with the opportunity for a compassionate hearing for family hardship relief under INA, § 212(h), 8 U.S.C. § 1182(h).

Respectfully Submitted,
Precious Bankole,
Petitioner-Appellant,
By her attorney,

JEFFREY B. RUBIN, ESQ.
LAW OFFICES OF JEFFREY B. RUBIN, ESQ.
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Boston, Massachusetts 02108
(617) 367-0077

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 23rd day of March, two thousand and five.

PRESENT:
HON. CHESTER J. STRAUB,
HON. RICHARD C. WESLEY,
Circuit Judges, and
HON. WILLIAM K. SESSIONS, III,
Chief District Judge.[1]

PRECIOUS BANKOLE,
Petitioner-Appellant,

v.

SUMMARY ORDER
No. 04-0832-pr

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

---

[1] The Honorable William K. Sessions, III, Chief Judge, United States District Court for the District of Vermont, sitting by designation.

Appearing for Petitioner-Appellant: Jeffery B. Ring, Jeffrey B. Rubin, P.C., Boston, MA

Appearing for Respondent-Appellee: James K. Filan, Jr., Assistant United States Attorney for the District of Connecticut (Kevin J. O'Connor, United States Attorney, on the brief; Sandra S. Glover, Assistant United States Attorney, of counsel), Bridgeport, CT

Appeal from the United States District Court for the District of Connecticut (Ellen B. Burns, *Judge*).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby **AFFIRMED.**

Petitioner-Appellant Precious Bankole, a native and citizen of Nigeria, appeals from a final order entered in the District of Connecticut (Ellen B. Burns, *Judge*) denying Bankole's petition for a writ of habeas corpus and for a hearing under Section 212(h) of the Immigration and Nationality Act ("INA"). On appeal, Ms. Bankole argues that the District Court erred in finding that she would not be subject to imprisonment and torture upon her return to Nigeria. Ms. Bankole also argues that the District Court erred in not extending the holding of *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y.2002), to her case. We assume the parties' familiarity with the facts,

decisions and records below, submissions of the parties in the matter as present, and issues on appeal.

When reviewing a district court's denial of a habeas petition brought pursuant to 28 U.S.C. § 2241, this Court reviews the merits of the habeas petition *de novo*. *See Wang v. Ashcroft*, 320 F.3d 130, 139-40 (2d Cir.2003) (citing *Kuhali v. Reno*, 266 F.3d 93, 99 (2d Cir.2001)). This court has not yet enunciated "the precise standard to adopt for reviewing a BIA's application of law to fact pursuant to a § 2241 petition." *Wang*, 320 F.3d at 143. Because we find no error in the BIA's final decision, even if our review is *de novo*, we need not here address the proper standard of review. To the extent the District Court's own fact findings are challenged, this Court reviews the District Court's fact findings for clear error. *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168 (2d Cir.2001).

For an alien to obtain protection under Article 3 of the United Nations Convention Against Torture, it must appear that, if returned to her country, she more likely than not would be tortured by, or with the acquiescence of, government officials acting under color of law. *Wang*, 320 F.3d at 133-34; 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(a). As to Ms. Bankole's potential imprisonment in Nigeria, we agree with the District Court that Ms. Bankole has not met her burden in proving "more likely than not" that she will be imprisoned and tortured under Nigerian Decree 33 for a drug offense. 8 C.F.R. § 208.16(c)(2). Ms. Bankole was convicted of money laundering, and has presented no evidence to suggest that Nigerian authorities would interpret her money laundering charge as a drug offense. Without such evidence, Ms. Bankole provides no basis for finding that she will be imprisoned and tortured upon her return to Nigeria.

We also agree with the District Court's holding that Ms. Bankole is not entitled to a Section 212(h) hearing. *See* 8 U.S.C. § 1182(h). Even assuming the

reasoning of the district court in *Beharry v. Reno* was still good law, Ms. Bankole's case here does not fall within the holding of *Beharry* since it is clear that her crime of money laundering was an aggravated felony under the laws in place at the time her offense was committed. Even going back to the 1991 version of the 8 U.S.C. § 1101(a)(43), Bankole's offense of money laundering is defined as an aggravated felony because she received a sentence of 63 months. 8 U.S.C. § 1101(a)(43) (Supp. II 1991).

For the reasons set forth above, the judgment of the District Court is hereby **AFFIRMED.**

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK

/s/ _____ 3/23/05
BY: DATE:

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 5th day of June, two thousand and three.

PRESENT:

HON. GUIDO CALABRESI,
HON. ROBERT D. SACKS,
Circuit Judges,
HON. NICHOLAS G. GARAUFIS,
*District Judge.**

PRECIOUS BANKOLE,
Petitioner-Appellant,

v. No. 02-2587

IMMIGRATION AND NATURALIZATION SERVICE, PAM RICHARDS, JOHN A. DANAHER, III.
Respondent-Appellee.

---

* The Honorable Nicholas G. Garaufis of the United States District Court for the Eastern District of New York, sitting by designation.

For
Petitioner-Appellant: JEFFERY B. RUBIN, Jeffrey B. Rubin, P.C., Boston, MA

For
Respondent-Appellee: JAMES K. FILAN, JR., Assistant United States Attorney, *for* Kevin J. O'Connor, United States Attorney, United States Attorney for the District of Connecticut (Jeffrey A. Meyer, *on the brief*).

Appeal from the United States District Court for the District of Connecticut (Burns, *J.*).

UPON DUE CONSIDERATION, it is hereby **ORDERED, ADJUDGED AND DECREED** that the judgment of the district court be and it hereby is **VACATED AND REMANDED.**

This appeal involves a habeas petition by an alien who is trying to avoid deportation to Nigeria, where she fears that she would be subjected to life-threatening prison conditions and be unable to care for her American-born son, who has Down's Syndrome. The district court denied the petition. We vacate and remand on the basis of intervening case law.

I. BACKGROUND

The petitioner, Precious Bankole, is a Nigerian and lawful permanent resident of the United States,

where she has lived since 1972. In 1996 federal prosecutors, claiming that she served as a nominee owner of expensive cars for her drug-dealing son, charged her with conspiracy to engage in money laundering, perjury, and obstruction of justice. She was convicted on these counts and sentenced to 63 months' imprisonment.

The INS then initiated removal proceedings. Trying to avoid deportation, Bankole invoked various statutory exceptions. She sought cancellation of removal pursuant to Immigration and Nationality Act ("INA") § 240A(a), 8 U.S.C. § 1229b; asylum pursuant to INA § 208, 8 U.S.C. § 1158; withholding of removal pursuant to § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3); family hardship relief pursuant to INA § 212(h), 8 U.S.C. § 1182(h); and withholding of removal under the Convention Against Torture ("CAT"), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. 51, at 197, U.N. Doc. A/39/51 (1984), 23 I.L.M. 1027 (1984). Because Bankole had been convicted of an aggravated felony and sentence to more than five years' imprisonment, the immigration judge ruled that she was ineligible for any of these forms of relief except withholding pursuant to the CAT. As for the CAT, the immigration judge, relying on State Department reports, found that while Nigerian prison conditions were "harsh and life threatening," it was not likely that Bankole, if deported, would be tortured within the meaning of the CAT. Accordingly, the judge denied relief on this ground as well. The BIA affirmed summarily.

Bankole, pro se, then filed the instant 28 U.S.C. 2241 habeas petition, in which she restated the arguments she had made to the IJ and BIA, and further contended that her counsel in the administrative proceeding was ineffective. The district court denied her petition, holding, inter alia, that it lacked jurisdiction to consider the CAT claim because the torture convention was not "self-executing." Still

pro se, Bankole appealed on two grounds, asserting (1) that the district court erred in not considering (and vindicating) her CAT argument, and (2) that under Judge Weinstein's recent decision in *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), she is entitled to a hearing, pursuant to § 212(h) of the INA, on whether the order of deportation against her should be waived due to the "substantial hardship" her deportation would cause to her disabled citizen child.[1]

II. DISCUSSION

Not long after the district court's entry of judgment in this case, we decided *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003), in which we held that the Foreign Affairs Reform and Restructuring Act of 1988, which implements the relevant article of the Convention Against Torture, does not deprive the federal courts of habeas jurisdiction to review the BIA's denial of claims for withholding of removal pursuant to the CAT. *Id.* at 142. The government concedes that, in light of *Wang*, the district court erred in not passing on Bankole's CAT claim, but the government asks us to affirm the IJ's denial "on the merits," rather than remanding to the district court.

We decline the invitation. It is, of course, "our settled practice to allow the district court to address arguments in the first instance." *Farricielli v. Holdbrook*, 215 F.3d 241, 246 (2d Cir. 2000). We see nothing in the case before us that warrants a departure from this practice.[2] Accordingly, we remand for the district court to consider the CAT arguments.

---

[1] At some point after she submitted her brief on appeal, Bankole secured counsel, who has filed a reply brief on her behalf.

[2] We find ourselves ill-equipped to decide the CAT claim, as the parties have not included in the appendices on appeal the State Department reports and other documents that were before the IJ. In addition, there is some reason to believe that the CAT claim may be nontrivial, as in a recent case a BIA panel found

As for the possible *Beharry* application, this too is best considered in the first instance by the district court on remand. The government asks us instead to find a "waiver" of the *Beharry* argument, as it was not made to the court below. We think this inappropriate, as the petitioner was pro se and as such cannot fairly be expected to have had a nimble familiarity with the most recent, relevant case law. *Cf. Small v. Sec. of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) ("To require a pro se plaintiff . . . to wade through the case law of this Circuit in order to preserve her right to appellate review would be an unreasonable burden.") On remand, the district court may wish to consider (1) whether the plaintiff's failure to make a *Beharry*-type argument during the administrative proceedings (when she was counseled) amounts to a waiver; (2) whether, assuming *arguendo* that *Beharry* was rightly decided, petitioner was entitled to a § 212(h) hearing; (3) whether *Beharry*'s "international law" gloss on § 212(h) is correct;[3] and/or (4) any other arguments that the court deems relevant to the petitioner's request for a § 212(h) hearing. We, of course, express no view on any of the above arguments.

Accordingly, the judgment of the district court is VACATED, and the case is REMANDED for further proceedings consistent with this order.

Nigerian prison conditions to be so bad as to create a likelihood of torture for a woman, with health problems, whom the INS sought to deport on the basis of her felony drug convictions. The panel was reversed by the BIA en banc. But there were several dissenting voices. *See In re M-B-A-*, 23 I. & N. Dec. 474 (BIA 2002). (Bankole testified in proceedings before the BIA that she suffered from thyroid and uterine ailments for which she needed surgery.)

[3] On appeal in *Beharry*, we found a lack of exhaustion and vacated the district court's decision without expressing an opinion on whether Judge Weinstein correctly employed international law to determine the effect of recent amendments to the Immigration and Nationality Act. *See Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

For the Court,

ROSEANN B. MACKECHNIE,
Clerk of Court

/s/_____

A TRUE COPY
ROSEANN B. MACKECHNIE, CLERK

BY_____
DEPUTY CLERK

DATE:

APPENDIX C

United States District Court,
D. Connecticut.
Precious **BANKHOLE**, Petitioner
v.
IMMIGRATION & NATURALIZATION SERVICE et al., Respondents
No. 3:02-CV-702 (EBB).

Dec. 5, 2003.

Background: Lawful permanent resident alien filed pro se petition for writ of habeas corpus, challenging determination of the Board of Immigration Appeals (BIA) which denied her application for family hardship relief from deportation, and withholding of removal under the Convention Against Torture (CAT).

Holdings: Following remand, the District Court, Ellen B. Burns, Senior District Judge, held that:
(1) alien failed to show that it was more likely than not that she would be imprisoned and tortured upon her removal to Nigeria, as would make her eligible for withholding of removal under CAT, and
(2) alien was not eligible for family hardship relief.
Petition denied.

Jeffrey B. Rubin, Joyce Ruben & Zerola, Richard S. Ravosa, Jr., Boston, MA, for Petitioner.

US Court of Appeals, pro se, New York, NY, for Defendant.

James K. Filan, Jr., U.S. Attorney's Office, Bridgeport, CT, for Respondent.

RULING ON REMAND OF PETITION FOR HABEAS CORPUS

ELLEN B. BURNS, Senior District Judge.

INTRODUCTION

Petitioner Precious Bankhole, ("Petitioner" or "Bankhole"), is a native and citizen of Nigeria. She was admitted to the United States in 1972 as the spouse of a non-immigrant student and her status was adjusted to that of lawful permanent resident in 1984. On June 6, 1997, Petitioner was convicted in the United States District Court for the Eastern District of Virginia of: (1) conspiracy to commit money laundering in violation of 18 § 1956(c); (2) perjury, in violation of 18 U.S.C. § 1623; and (3) obstruction of justice, in violation of 18 U.S.C. § 1503. She was sentenced to 63 months in prison. Her conviction was affirmed by the Court of Appeals for the Fourth Circuit.

As a result of these convictions, Respondent instituted removal proceedings against Petitioner. She conceded her removability and sought asylum, cancellation of removal under the Immigration and Nationality Act ("INA"), § 240(A), family hardship relief pursuant to INA § 212(h), withholding of removal under INA § 241(B)(3), and withholding of removal under the Convention Against Torture ("CAT"), 1465U.N.T.S. 85, G.A. Res. 39/46, 39th Sess.,U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), 23 I.L.M. 1027 (1984). Because Bankhole had been convicted of an aggravated felony and sentenced to more than five years' imprisonment, the immigration judge ("IJ"), ruled that she was ineligible ruled for any of these forms of relief except witholding under CAT. After review, he

denied her claim for asylum under that Convention. The BIA summarily affirmed.

Petitioner, *pro se*, filed a Section 2241 habeas petition with this Court, which denied the petition, holding, *inter alios*, that it had no jurisdiction to review a claim under CAT in that the torture convention was not "self-executing" and that, as an individual convicted of an aggravated felony, Petitioner was ineligible for family hardship relief pursuant to the Immigration and Nationality Act ("INA"), Section 212(h), 8 U.S.C. Section 1182(h). The Court assumes familiarity with that opinion.

Still *pro se*, Bankhole appealed this Court's decision on two grounds: that the Court had erred in not considering, and vindicating, her claim under CAT; and that, under the recent decision in *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y.2002), she is entitled to a hearing, pursuant to INA Section 212(h), as to whether the order of deportation against her should be waived due to the "substantial hardship" her deportation would cause to her disabled citizen son, for whom still has been the sole caregiver for his entire life, until she was imprisoned, at which time her son was placed in foster care ..

Shortly after the entry of judgment by this Court, the Court of Appeals for the Second Circuit decided *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir.2003), in which that Court held that the Foreign Affairs and Restructuring Act of 1988, which implements the relevant article of CAT, does not deprive the federal courts of habeas jurisdiction to review the BIA's denial of claims for witholding of removal pursuant to CAT. Resultingly, the Appellate Court remanded for consideration of the CAT arguments, based on intervening law.

As to Petitioner's claim of family hardship, the Appellate Court suggested that this Court consider: (1) whether Petitioner's failure to make an argument similar to that in *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y.2002), during her administrative proceedings, amounts to a waiver of such an argument now; (2) whether Petitioner is entitled to a family hardship hearing, INA Section 212(h), under *Beharry*; (3) whether *Beharry's* "international law" gloss on Section 212(h) is correct; and (4) any other arguments the parties deem relevant to Petitioner's request for a Section 212(h) hearing. This Court ordered briefing from the parties on these four issues. Having received the memoranda of law from both parties, the petition is now ready for decision.[1]

LEGAL ANALYSIS

I. *CAT*

[1] The issue before this Court, pursuant to an analysis of CAT, is whether Petitioner has met her burden of establishing that she is eligible for deferral of removal under the Convention by proving that it is more likely than not that she will be imprisoned and tortured upon her removal to Nigeria. *See* 8 C.F.R. §§ 208.16(c)(4), 208.18(a)(2002); *Matter of S-V-*, 22 I & N Dec. 1306 (BIA 2000). In making this determination, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to, evidence of past torture, evidence that Petitioner could relocate to a part of the country where she is not likely to be tortured, evidence of gross, flagrant, or mass violations of human rights within the country of removal, and any other relevant information regarding conditions in the

[1] At some point after she submitted her brief on appeal, Bankhole secured counsel, who filed a reply brief in the Court of Appeals and the present memorandum of law on her behalf.

country of removal. *See* 8 C.F.R. § 208.16(c)(3). Torture is defined, in pertinent part, as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her, or a third party, information or a confession, punishing [her] for an act he or she or a third party has committed or is suspected of having committed, or intimidating or coercing him, her, or a third person, for any reason based on discrimination of any kind when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity... [t]orture is an extreme form of cruel and unusual and inhuman treatment. It does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture... [i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act which results in unanticipated or unintended severity of pain and suffering is not torture." *See* 8 C.R.F. §§ 208.18(a)(1); 208.18(a)(2); 208(a)(5).

Bankhole has stated that, if she is returned to Nigeria, she will be tortured and imprisoned, pursuant to the 1990 Decree No. 33 of the Nigerian Drug Enforcement Agency. This Decree provides that a Nigerian citizen who is convicted of a narcotic drug offense in a foreign country, or is detected carrying a narcotic drug into a foreign country after a journey originating from Nigeria "shall be liable to imprisonment for a term of five years without an option of fine and [her] assets and properties shall be liable to forfeiture as provided by this Decree." *See generally McDaniel v. United States INS*, 142 F.Supp.2d 219, 223 (D.Conn.2001).

Initially, this Court must respectfully disagree with the finding of the IJ that "[t]here is no evidence that, while conditions in the Nigerian prison system are very poor for anyone who is detained in that system, there would be intentional infliction of harm by the authorities." Oral Decision of Immigration Judge, November 28, 2001 at 11-12. The Nigerian Report on Human Rights Practices, issued by the U.S. Department of State on February 23, 2001, provides, in pertinent part:

> Prison and detention conditions remained harsh and life threatening... Lack of potable water, inadequate sewage facilities, and severe overcrowding resulted in unhealthy and dangerous sanitary conditions. Disease was pervasive ... inmates had to provide their own food [and] only those with money or whose relatives brought food regularly had sufficient food ... [m]any inmates were forc[ed] to sleep on concrete floors, often without a blanket... prison officials, police, and security forces often denied inmates food and medical treatment as a form of punishment or to extort money from them. Harsh conditions and denial of proper medical treatment contributed to the deaths in detention of numerous prisoners. A reputable human rights organization estimated... that **at least one inmate died per day** in the Kiri Kiri prison in Lagos alone. According to the same nongovernmental organization, dead inmates promptly are buried in mass graves on the prison compounds, usually without their families having been notified. Although the Constitution of Nigeria prohibits torture and

> mistreatment of prisoners, police and security forces regularly beat detainees and convicted prisoners.

As noted above, torture is an extreme form of cruel and unusual and inhumane treatment. Further, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. Surely, when officials involved with a prison system intentionally withhold required medical treatment for punishment or extortion, this is an act "specifically intended to inflict severe physical and or mental pain and suffering." When at least one inmate dies per day in a prison, in part due to the witholding of proper medical treatment, it must be inferred that an extreme form of cruel and unusual and inhumane treatment is occurring therein. This Court does not accept the rationale that simply because "Nigeria is a very poor country... it may not have the resources to maintain an adequate prison system." Oral Decision of Immigration Judge, November 28, 2001 at 11. "Adequate" is the complete antithesis of the extreme form of cruel, unusual or inhumane treatment described above.

The difficulty with Petitioner's claim that she would be subjected to this type of horrific treatment is that she was not convicted of a drug offense within the meaning of Decree No. 33. Rather, she was convicted of conspiracy to commit money laundering, 18 U.S.C. § 1956(h); perjury, 18 U.S.C. § 1623; and obstruction of justice, 18 U.S.C. § 1503. Her son was charged in the same Indictment with various violations of the money laundering statutes, *see* Indictment 1996 Term at Alexandria, Criminal No. 96-00479-A, at Counts 1, 2, 3, 4, and 5. Although de minimus paragraphs in the Indictment refer solely to **Bankhole's** son's trafficking in crack cocaine, **he was not indicted on any drug related offense** and she most assuredly was

not. *See* Indictment at Counts 1; 6; and 7. Petitioner's claim under CAT, therefore, must fail, as it is beyond peradventure that she is not a "Nigerian citizen who [has been] convicted of a **narcotic drug offense** in a foreign country." Decree No. 33 (1990) (emphasis added). Hence, it is unreasonable to believe that Petitioner will be imprisoned upon her return to Nigeria, let alone tortured therein.

II. *Claims Pursuant to Beharry v. Reno, 183 F.Supp.2d 584 (E.D.N.Y.2002) (Weinstein, J.)*

A. Whether Petitioner Failed to Exhaust Her Administrative Remedies

Initially, the INS contends that Petitioner waived her right to make a *Beharry*-type international law claim by failing to raise the issue before the administrative agency. The Court of Appeals rejected the claim that Petitioner had waived her *Beharry*-type argument, as it was not presented to this Court. "We think this inappropriate, as the petitioner was pro se and as such cannot fairly be expected to have had a nimble familiarity with the most recent, relevant case law." *Bankhole v. INS, et al.*, Doc. No. 02-2587, *slip op.* at 5 (2d Cir. June 5, 2003). This Court now holds that she did not waive her *Beharry*-type argument before the INS, as the initial removal proceedings, at which the IJ found her deportable, were held on November 28, 2001, and *Beharry* was not decided until January 22, 2002. It would be unjust to hold Petitioner's counsel, who appeared on her behalf before the IJ, accountable for failing to make the extraordinary arguments as to complex international law upon which *Beharry* was decided three months later. Further, Petitioner did make a claim pursuant to the identical section of the INA presently under consideration, Section 212(h) of the INA, 8 U.S.C. § 1182(h). "[Petitioner] applied for relief in the form of ... a sec. 212(h) waiver." Oral

Decision of Immigration Judge, dated November 28, 2001 at 2. The Court agrees with Bankhole that she need not have made the exact same type of argument before the administrative agency as she is presently making before this Court. *See Elliot Coal Min. Co., Inc. v. Director, Office of Workers' Compensation Programs*, 17 F.3d 616 (3rd Cir.1994)(though statutory construction argument not raised by Director in administrative proceedings, it was nevertheless open to consideration by Court of Appeals as alternative theory on which decision of administrative agency could be affirmed).

B. *Application of Beharry to the Present Case*

[2] Section 212(h) of the INA allows discretionary relief from deportation for aliens who have established seven years of residence in the United States and who have a family member who would suffer "extreme hardship" if the alien is removed. However, Section 212(h) does not apply to a lawful permanent resident who has been convicted of an "aggravated felony." *See* 8 U.S.C. 1101(a)(43) (denominating specific crimes as aggravated felonies).

In *Beharry*, the court looked to the International Covenant on Civil and Political Rights[2], the Convention of Rights of the Child[3], and the Universal Declaration of Human Rights[4] to hold that customary international law requires the INS to hold "compassionate" hearings prior to deporting certain lawful permanent residents who have resided in the United States for seven years and will have extreme

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[2] S. Treaty Doc. 95-2 (1978), 999 U.N.T.S. 171.

[3] U.N. Doc. A/44/736 (1989), reprinted in 28 L.L.M. 1457 (1989).

[4] G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 1, U.N. Doc. A/810 (1948).

hardship to family--- namely, ***those aliens who have been convicted of an "aggravated felony" as defined after they committed their crime, but which was not so characterized when they committed the crime.*** *Beharry*, 183 F.Supp.2d at 585-87, 603-605.

In the present case, Petitioner was convicted on *June 6, 1997* for, *inter alios*, conspiracy to commit money laundering in violation of 18 U.S.C. Section 1956(h). She was sentenced to 63 months in prison. However, as early as ***January 3, 1989***, Section 1101(a)(43) included, as an aggravated felony, "any offense described in section 1956 of Title 18 (relating to the laundering of monetary instruments.") 8 U.S.C. 1101(a)(43)(1988 Ed. Supp. II). ***In *190 1990***, Section 1101(a)(43) provided, in pertinent part, that aggravated felonies included "any offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) ... for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act ...." 8 U.S.C. § 1101(a)(43)(1990). Accordingly, Petitioner was convicted in 1997 of a crime denominated as an "aggravated felony" in excess of eight years ***prior*** to her conviction. Accordingly, she fails to bring herself within the ambit of *Beharry;* thus, it is unnecessary for this Court to explore the many esoteric issues of international law raised in that case and opine whether Judge Weinstein was right or wrong.

Inasmuch as the *Beharry* exception is inapplicable in this case, the Court turns to the present status of Petitioner's statutory rights under the INA. In September, 1996, Congress amended INA Section 212(h) to preclude any waiver of deportation for a lawful permanent resident, who, after lawful admittance, committed any of the now vastly

extended list of offenses, continuing to include conspiracy to commit money laundering, and adding obstruction of justice and perjury:

> "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if ... since the date of such admission the alien has been convicted of an aggravated felony.

Id., as amended by § 348(a) of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009-546 (1996). *See also* 8 U.S.C. 1101(a)(43)(1996). It has been held that IIRIRA's new definition of "conviction" is referring to Fed.R.Crim.Pro. 32(d)(1)'s definition of "judgment of conviction". *Perez v. Elwood*, 294 F.3d 552, 562 (3rd Cir.2002). Therefore, for purposes of the INA, a conviction occurs when, *inter alios*, a "formal judgment of guilt of the alien [is] entered by the Court." 8 U.S.C. § 1101(a)(48)(A); Fed.R.Crim P. 32(d)(1). As noted above, Petitioner entered this Country in 1972 and became a lawful permanent residence in 1984. She was convicted within the meaning of IIRIRA on June 6, 1997, when the Virginia district court filed its Judgment in a Criminal Case. This means that Petitioner was convicted after April 1, 1997, the effective date of IIRIRA Section 304(b), the section that repealed the right to an INA discretionary hearing on waiver of removal. Thus, for this reason, also, Petitioner's request for a compassionate hearing must be denied.

CONCLUSION

Inasmuch as Petitioner has not been convicted of a drug related offense under Nigerian law, there is no evidence to support her claim that she will be imprisoned and tortured upon removal to Nigeria, under CAT. She is not entitled to a *Beharry*-type compassionate hearing as, in contradistinction to *Beharry*, Bankhole's crime of conspiracy to launder money was categorized as an aggravated felony ***at the time she committed the crime.*** *Cf. Beharry*, 183 F.Supp.2d at 605. Finally, her right to a discretionary waiver of removal was repealed two months before her conviction.

For these reasons, this Court holds that Bankhole's Petition for Writ of Habeas Corpus and for a compassionate hearing under Section 212(h) must be DENIED. The Clerk is directed to close this case.

SO ORDERED.

APPENDIX D

TREATIES, STATUTES AND REGULATIONS

CONVENTION AGAINST TORTURE and Other Cruel, Inhuman or Degrading Treatment or Punishment

. . . . . .

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

. . . . . .

8 U.S.C.A. § 1101

§ 1101. Definitions

(a) As used in this chapter--

. . . . . .

(43) The term "aggravated felony" means--
(A) murder, rape, or sexual abuse of a minor;
(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a

drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at [FN3] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [FN3] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses),

for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [FN4]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

. . . . .

8 U.S.C.A. § 1182

§ 1182. Inadmissible aliens

. . . . .

(H) Significant traffickers in persons

(i) In general

Any alien who is listed in a report submitted pursuant to section 7108(b) of Title 22, or who the consular officer or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the

financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

. . . . .

18 U.S.C.A. § 1503

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be

imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is--

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C.A. § 1623

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United

States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C.A. § 1956

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
(A)(i) with the intent to promote the carrying on of specified unlawful activity; or
(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
(B) knowing that the transaction is designed in whole or in part--
(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--
(A) with the intent to promote the carrying on of specified unlawful activity; or
(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such

transportation, transmission, or transfer is designed in whole or in part--

(I) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(II) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.--

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.--For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.--A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.--

(A) In general.--A court described in paragraph (2) may appoint a Federal Receiver, in accordance with

subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.--A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;
(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;
(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;
(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;
(6) the term "financial institution" includes--
(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and
(B) any foreign bank, as defined in section 1 [FN1] of the International Banking Act of 1978 (12 U.S.C. 3101);
(7) the term "specified unlawful activity" means--
(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is

indictable under subchapter II of chapter 53 of title 31;
(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--
(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);
(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);
(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978)); [FN2]
(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;
(v) smuggling or export control violations involving--
(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or
(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or
(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States;
(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);
(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false

oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 [FN3] (relating to fraudulent Federal credit institution entries), 1007 [FN3] (relating to fraudulent Federal Deposit Insurance transactions), 1014 [FN3] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 [FN3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114

(relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), or section 2339A or 2339B (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the

Food Stamp Act of 1977 [7 U.S.C.A. § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons) [FN4]

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving

offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) **Notice of conviction of financial institutions.**--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) **Venue.**--(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be

brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

8 C.F.R. § 208.16

§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

. . . . . .

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of

removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

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